

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 Civil No. 07-cv-12062-MLW

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5
6 UNITED STATES OF AMERICA,
7 Petitioner

8 vs.

9 ANDREW M. SWARM,
10 Respondent

11
12 *****

13 For Hearing Before:
14 Chief Judge Mark L. Wolf

15 18:4248(a) Commitment of Sexually Dangerous Person

16 Judge's Decision

17
18 United States District Court
19 District of Massachusetts (Boston.)
20 One Courthouse Way
21 Boston, Massachusetts 02210
22 Friday, January 21, 2011

23 *****

24 REPORTER: RICHARD H. ROMANOW, RPR
25 Official Court Reporter
United States District Court
One Courthouse Way, Room 5200, Boston, MA 02210
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For the Respondent

1 P R O C E E D I N G S

2 (Begins, 1:20 p.m.)

3 THE CLERK: Civil Action 07-12062, United
4 States versus Andrew Swarm. The Court is in session.
5 You may now be seated.

6 THE COURT: Do we have Mr. Watkins on the
7 line?

8 THE CLERK: He's on the line, your Honor.

9 THE COURT: All right. Would counsel please
10 identify themselves for the record.

11 MS. CONNOLLY: Rosemary Connolly for the
12 United States of America.

13 MS. PIEMONTE-STACEY: Good afternoon, your
14 Honor. Eve Piemonte-Stacey for the United States of
15 America.

16 MR. GOLD: Good afternoon, your Honor. Ian
17 Gold on behalf of Andrew Swarm. And Tim Watkins is on
18 the speaker phone, I believe.

19 THE COURT: Mr. Watkins, are you there?

20 MR. WATKINS: Good morning, your Honor. Tim
21 Watkins by speaker phone.

22 THE COURT: Okay. I can tell you're in
23 Arizona. It's afternoon in here. Mr. Swarm is also
24 present.

25 As I said on Wednesday, this matter has been

1 extremely well tried by counsel. There are some
2 preliminary matters that I won't get into deeply, but I
3 find that the provision of the Adam Walsh Act at issue,
4 Section 4248, is civil rather than criminal. It does
5 not violate Mr. Swarm's right to equal protection. At
6 some point I'll have you back to explain that or write a
7 few paragraphs on it.

8 But what I am going to do today is what I told you
9 Wednesday. It's my intention to decide this matter
10 orally. I hope the level of detail, among other things,
11 does not suggest that I've decided it at all casually.
12 This is plainly of significant importance to the parties
13 and the public and I don't decide anything casually
14 anyway. But I'm immersed in this. I'm able to explain
15 my reasoning to you. And I don't know when I could get
16 back to this if I wanted to write something like my
17 **Wilkinson** decision, in the companion case, and I think
18 it's particularly in the public interest that this
19 matter get resolved. Mr. Swarm has been detained now
20 several years after the end of his prison sentence. And
21 this is going to take a while. I would expect at least
22 an hour to fully explain.

23 But by way of summary, in February of 2007 the
24 Bureau of Prisons certified Andrew Swarm -- well, in
25 February of 2007, Andrew Swarm was concluding a four-

1 month sentence for violating the terms of his supervised
2 release. The Bureau of Prisons certified him as
3 sexually dangerous, on February 20th, I believe, of
4 2007, and requested that he be indefinitely committed
5 civilly under the then new Adam Walsh Act, 18 United
6 States Code, Section 4248. I've conducted a five-day
7 evidentiary hearing in January of 2011.

8 For the reasons I'll explain in detail, I find
9 that the United States has failed to prove that
10 Mr. Swarm will have serious difficulty in refraining
11 from molesting children if released on the currently-
12 ordered conditions of his supervised release, four and a
13 half years of supervised release, regardless of whether
14 Mr. Swarm is provided pharmacological treatment as the
15 current conditions of supervised release would permit,
16 but not require. Therefore, Mr. Swarm is entitled to be
17 released on those conditions.

18 I'm ordering that Mr. Swarm be released, unless
19 another order issues, on March 7th, 2011. The time
20 until March 7th, I find, is necessary to permit the
21 transcript to be prepared, as soon as possible, to give
22 the government an opportunity to consider whether it
23 wishes to appeal and seek a stay of this decision and to
24 permit the Bureau of Prisons and the United States
25 Probation Department to develop a release plan for

1 Mr. Swarm to assure an effective transition to
2 supervised release if Mr. Swarm is released on March
3 7th, 2011.

4 The procedural history of this case is as
5 follows. In 2000, Swarm pled guilty to the receipt of
6 child pornography, the possession of child pornography,
7 and growing marijuana. He was sentenced to 74 months in
8 prison to be followed by 5 years supervised release on
9 certain conditions. The sentencing judge recommended
10 that Swarm participate in the Bureau of Prisons' sex
11 offender treatment program conducted at FMI Butner. The
12 Bureau of Prisons did not, however, place Swarm in its
13 sex offender treatment program at Butner. It only has
14 beds for about 1 percent of prisoners eligible for that
15 program, that is, prisoners who are sex offenders.
16 Instead, Mr. Swarm was designated and served his
17 sentence at FCI Dix in New Jersey. Swarm was released
18 from prison in September of 2003 to reside in the area
19 of Binghamton, New York. His five years of supervised
20 release then began.

21 The original conditions of Swarm's supervised
22 release required, among other things, the following:
23 That Swarm not have direct or indirect contact with any
24 person under age 18 unless it was supervised by a person
25 approved by Swarm's probation officer. His conditions

1 also required that Swarm complete sex offender treatment
2 as directed by his probation officer. They require that
3 Swarm submit to alcohol and drug testing and complete a
4 substance abuse treatment program prescribed by his
5 probation officer. The conditions also included that
6 Swarm submit truthful monthly reports concerning
7 information requested by his probation officer.

8 When he was released, Swarm agreed to more
9 stringent conditions of supervised release because --
10 the probation department requested them because the
11 conditions recommended for sex offenders had evolved
12 since his original sentencing. The new conditions to
13 which Mr. Swarm agreed included periodic polygraph exams
14 to determine whether he was complying with the
15 conditions of his supervised release including whether
16 he was abiding by the requirement that he not associate
17 with children under 18 unless supervised by a person
18 approved by his probation officer.

19 Swarm participated in drug testing and treatment
20 while on supervised release. He never tested positive
21 for the use of marijuana or any other drug. I find that
22 he did not use marijuana or any other drug while on
23 supervised release. Indeed, I find that he has not used
24 marijuana or unlawfully used any other controlled
25 substance since his arrest in 2000.

1 Swarm also participated in a weekly sex offender
2 group therapy program at the Family and Children's
3 Society, which had been prescribed by his probation
4 officer. Swarm attended all meetings and was perceived
5 by his therapist, Ms. Walsh, to be progressing well in
6 treatment. In addition, Swarm followed the proper
7 process and had several adults, approved by his
8 probation officer, to supervise him when Swarm was in
9 the presence of their minor children, generally while
10 visiting his friends.

11 However, in the course of his group therapy, Swarm
12 acknowledged that on several occasions he had briefly
13 been in the presence of minor children without an
14 approved supervising adult. He also revealed that a
15 child, age 6, had hugged his legs and another, also age
16 6, had sat on his lap briefly. Swarm, after disclosing
17 these events to his therapy group, belatedly disclosed
18 them to his probation officer. Some of the disclosures
19 were made shortly before a scheduled polygraph exam that
20 Swarm was afraid he would fail.

21 On October 31, 2006, Swarm's supervised release
22 was revoked because of his unsupervised association or
23 unapproved association with minors and failure to
24 properly report those events to his probation officer.
25 He did not, however, while on supervised release, molest

1 any child.

2 When his supervised release was revoked in October
3 of 2006, Swarm was sentenced to four months in custody
4 to be followed by four and a half years of supervised
5 release. The revised conditions of supervised release
6 imposed at that time include no direct contact with a
7 person under 18 unless it is supervised by a person
8 approved by his probation officer, staying away from
9 areas that persons under 18 are likely to congregate,
10 home detention on electronic monitoring and/or GPS to
11 the extent directed by the probation officer,
12 participation in a sex offender treatment program
13 approved by his probation officer and such a program
14 could include pharmacological treatment. The conditions
15 of supervised release were tightened to absolutely
16 prohibit the use of alcohol and again prohibit the use
17 of controlled substances. Swarm, as a condition of his
18 supervised release, is required to participate in
19 substance abuse testing and treatment to the extent
20 ordered by his probation officer.

21 Swarm was scheduled to be released from his four-
22 month sentence on February 21, 2007. On February 20,
23 2007, the Bureau of Prisons certified Swarm as sexually
24 dangerous and therefore subject to indefinite civil
25 commitment under the then new Adam Walsh Act. This

1 court subsequently found probable cause to support that
2 certification and to continue Swarm's detention. As
3 required by the statute, the Court appointed two
4 examiners, one, Dr. Fabian Saleh, was designated by
5 Mr. Swarm; the second, Dr. Barry Mills, was designated
6 by the Court.

7 The parties agreed that no hearing, evidentiary
8 hearing concerning Mr. Swarm would be conducted until
9 another Adam Walsh Act case regarding Steven Wilkinson
10 was tried by me and then later agreed that this case
11 would not be tried until the Supreme Court started
12 deciding the constitutionality of the Adam Walsh Act,
13 which occurred in **Comstock**, 130 S. Ct. 1949, in May of
14 2010. As indicated earlier, an evidentiary hearing in
15 this case was held in January of 2011. The examiners,
16 Swarm, his probation officer, Michael Pierce, his
17 therapist from the Family and Children's Society, Sarah
18 Walsh, and two officials at the Bureau of Prisons who
19 deal with sex offenders, each testified. For the
20 reasons that will be described, as I said earlier, the
21 government has not satisfied its burden of proving, by
22 clear and convincing evidence, that Swarm's civil
23 commitment is justified.

24 With regard to the legal framework the parties
25 agree that the applicable framework is correctly stated

1 in my decision in **Wilkinson**, 646 F. Supp. 2d 194, 198 to
2 201. As always the legal standards define the relevant
3 questions that are important, so I'll take some time to
4 read them and therefore incorporate them in this
5 decision.

6 As I wrote in **Wilkinson**, beginning on Page 198:
7 "The Adam Walsh Act authorizes the civil commitment of
8 an individual proven by clear and convincing evidence to
9 be a sexually dangerous person. The clear and
10 convincing standard requires the government in this case
11 to place in the ultimate factfinder, the court, an
12 abiding conviction that the truth of its factual
13 contentions are highly probable." I won't reiterate the
14 cites, but that's the description of the Supreme Court
15 in **Colorado vs. New Mexico**. "This burden is satisfied
16 only when the material the government offered instantly
17 tilted the evidentiary scales in its favor when weighed
18 against the evidence the respondent offered in
19 opposition." Again, that's the Supreme Court. "The
20 First Circuit has described the standard as more than a
21 preponderance, but less than beyond a reasonable
22 doubt."

23 A "sexually dangerous person" means a person who
24 has engaged or attempted to engage in sexually violent
25 conduct or child molestation and who is sexually

1 dangerous to others. "Sexually dangerous to others,"
2 with respect to a person, means that the person suffers
3 from a serious mental illness, abnormality, or disorder
4 as a result of which he would have serious difficulty in
5 refraining from sexually violent conduct or child
6 molestation if released.

7 The Adam Walsh Act essentially requires clear and
8 convincing proof of four things: (1) the person has a
9 qualifying conviction; (2) the person has a serious
10 mental impairment; (3) as a result of that impairment,
11 the person cannot adequately control his behavior; and
12 particularly (4) the person who will because of that
13 impairment have serious difficulty in refraining from
14 molesting children or committing sexually violent
15 crimes. The language of the Adam Walsh Act indicates
16 that it was adopted in an effort to conform to the
17 Supreme Court's decision concerning the parameters of
18 permissible civil commitment of sexually dangerous
19 individuals, particularly **Kansas vs. Crane** and **Kansas**
20 **vs. Hendricks**.

21 The Constitution generally requires reliance upon
22 the criminal law to deal with dangerous people by
23 threatening punishment in an effort to deter criminal
24 conduct and protecting the community by imprisoning
25 individuals who despite that threat have been proven

1 beyond a reasonable doubt to have committed a crime.
2 Therefore, a finding of dangerousness, standing alone,
3 is ordinarily not a sufficient ground upon which to
4 justify indefinite involuntary commitment.

5 In **Hendricks**, the individual subject to commitment
6 suffered from pedophilia. According to the Supreme
7 Court, he had a "chilling history of repeated child
8 sexual molestation and abuse." Indeed, Hendricks
9 admitted that he had repeatedly abused children whenever
10 he was not confined. He conceded that when he became
11 stressed out, he could not control the urge to molest
12 children.

13 The Supreme Court held, quote: "The admitted lack
14 of volitional control coupled with a prediction of
15 future dangerousness adequately distinguishes Hendricks
16 from other dangerous persons who are perhaps more
17 properly dealt with exclusively through criminal
18 proceedings. Hendricks' diagnosis as a pedophile, which
19 qualifies as a mental abnormality under the Act, does
20 plainly suffice for due process purposes," end quote.
21 Therefore the Kansas statute at issue in **Hendricks** was
22 held to provide for constitutionally permissible civil
23 commitment.

24 In **Crane**, the Supreme Court clarified and
25 emphasized that the Constitution only permits the civil

1 commitment of a dangerous sexual offender pursuant to a
2 statute that requires proof that a mental impairment
3 significantly injures an individual's ability to control
4 his behavior. As the Supreme Court explained: "The
5 presence of what the psychiatric profession itself
6 classifies as a serious mental disorder, pedophilia,
7 helped to cause the commitment of Hendricks to be
8 properly characterized as civil rather than criminal.
9 And a critical distinguishing feature of that serious
10 disorder there consisted of a special and serious lack
11 of ability to control behavior."

12 The Court went on to explain that to establish a
13 proper basis for civil commitment of an allegedly
14 sexually dangerous person, quote: "There must be proof
15 of serious difficulty in controlling behavior and this,
16 when viewed in the light of such features of the case as
17 the nature of the psychiatric diagnosis and the severity
18 of the mental abnormality itself, must be sufficient to
19 distinguish the dangerous sexual offender whose serious
20 mental illness, abnormality or disorder subjects him to
21 civil commitment from the dangerous but typical
22 recidivist convicted in an ordinary criminal case."

23 **Crane** was a previously-convicted sexual offender
24 who, according to at least one of the State's
25 psychiatric witnesses, suffered from both exhibitionism

1 and antisocial personality disorder. The Court remanded
2 the case for determination of whether this combination
3 of conditions justified civil commitment. In doing so,
4 **Crane** clarified several ambiguities in **Hendricks**
5 relevant to the Adam Walsh Act and the instant case. It
6 explained that **Hendricks** set forth no requirement of
7 total or complete lack of control. The Kansas statute
8 at issue in **Hendricks** and **Crane** requires only a "mental
9 abnormality or personality disorder that makes it
10 difficult if not impossible for the dangerous person to
11 control his behavior." Therefore, the civil commitment
12 of dangerous sexual offenders will normally involve
13 individuals who find it particularly difficult to
14 control their behavior. In ordinary English, they're
15 unable to control their dangerousness.

16 As the parties also agree, in **Wilkinson**, at page
17 208, I correctly concluded -- the parties agree that I
18 correctly concluded that the existing conditions of
19 supervised release, those already imposed, should
20 properly be considered in deciding whether the standard
21 for civil commitment has been met. The government
22 acknowledged that in its trial brief at pages 14 to 15
23 and Swarm did the same in his trial brief at pages 9 to
24 10.

25 In a criminal case "the proposed conditions for

1 potential release must be reasonable and feasible rather
2 than extraordinary," the Fourth Circuit said in **Tortora**,
3 922 F. 2nd 883 at 887 to 888. I assume that the same is
4 true in this case. 28 CFR Section 549.92 defines
5 "sexually violent conduct" as such -- defines "sexually
6 violent conduct." Pursuant to that regulation, such
7 conduct must involve "the use or threatened use of
8 force." The government properly agrees that the
9 evidence in this case does not suggest that Swarm
10 presents a risk of committing sexually violent conduct
11 in the future. 28 CFR Section 549.93 defines "child
12 molestation" as including, quote, "any unlawful conduct
13 of a sexual nature with or a sexual exploitation of a
14 person under age 18." I accept this definition for the
15 purpose of this case. The government states that the
16 receipt or possession of child pornography does not
17 constitute "child molestation." I agree.

18 My findings of fact and conclusions of law are as
19 follows. With regard to the findings of fact, I assess
20 the credibility of all the witnesses and the evidence.
21 I have had the opportunity, and it was a valuable
22 opportunity, to assess the demeanor of the witnesses,
23 particularly Mr. Swarm. I've considered the extent to
24 which other evidence in the case either corroborates or
25 contradicts what any witness said. And I have used, to

1 the best of my ability, common sense.

2 Most of the material facts are not in dispute.

3 Mr. Swarm is now 47 years old. He's lived in the
4 Binghamton, New York area most of his life. Mr. Swarm
5 is close to many members of his family, but not to his
6 father, who was promiscuous and abusive generally when
7 Swarm was young. As a teenager Swarm came to understand
8 that his father had sexually abused his younger sister
9 and Swarm became protective of his sister.

10 Swarm has had one sexually intimate relationship
11 in his life. When he was 18 or 19 Swarm began an
12 intimate relationship with a 13-year-old girl named
13 [REDACTED]. [REDACTED] had, by that time, reached puberty, she
14 was then sexually experienced before she became involved
15 with Swarm, and indeed was taking birth control pills at
16 the time. Swarm and [REDACTED] were boyfriend and girlfriend
17 for about three years. Their relationship was accepted
18 rather than condemned by their friends and their
19 families. However, because Swarm was more than 18 years
20 old and [REDACTED] was less than 15 years old, under New York
21 law his sexual intercourse with [REDACTED] constituted second
22 degree rape, which is a Class D felony, according to The
23 Consolidated Laws of New York, Section 130.3. Swarm,
24 however, was not charged or convicted with the
25 commission of any crime concerning [REDACTED].

1 When [REDACTED] broke up with Swarm in about 1985,
2 Swarm was devastated. He began drinking heavily and
3 abusing drugs intensely. He had suicidal thoughts and
4 indeed attempted suicide on more than one occasion.

5 In about 1992, Swarm began to regularly babysit
6 his nine-year old step-niece [REDACTED]. He developed a
7 strong sexual attraction to [REDACTED]. Swarm masturbated
8 to fantasies of her sometimes in her presence while she
9 slept. On one occasion, while [REDACTED] was sleeping,
10 Swarm rubbed his penis along the crotch of her
11 underpants. Swarm knew that this conduct was wrong and
12 did not want to do anything else to [REDACTED].

13 In January of 1994, Swarm touched the then 11-year
14 old [REDACTED] thigh, said that he wanted to kiss her and
15 gave her a note that said, "Don't be scared. I have a
16 problem and I need your help to end it. I want to kiss
17 and touch you in ways that I shouldn't. I need you to
18 make sure I get help and don't have the chance to do
19 this. I've been having a hard time suppressing these
20 urges and I'm afraid that if you're here at night I
21 might touch you in ways I'm not supposed to. I don't
22 want you to hate me. I'm sick mentally and want help.
23 Please find a way not to stay here at night until I've
24 gotten help. I know you're scared and you have every
25 right to be, but you shouldn't have to be. Please

1 forgive me for feeling this way." That note is quoted
2 in Exhibit 27, Mr. Swarm's presentence report in the
3 federal prosecution.

4 As a result of this disclosure, which Mr. Swarm
5 expected [REDACTED] would make to her parents, Swarm was
6 convicted of attempted sexual abuse and sentenced to one
7 year of probation. It is this conviction that makes
8 Swarm eligible for civil commitment under the Adam Walsh
9 Act.

10 While on probation Swarm participated in a
11 treatment program at a mental health clinic in Cortland
12 County, New York. There he was diagnosed with
13 pedophilia. The therapy he was offered, however, did
14 not focus on pedophilia specifically. Swarm withdrew
15 from the program two months after his probation ended.

16 It is undisputed that Swarm has the mental illness
17 known as pedophilia, a form of paraphilia. In addition,
18 the examiners in this case have each correctly diagnosed
19 Swarm with a personality disorder not otherwise
20 specified. However, the government does not contend
21 that this diagnosis alone would be sufficient for
22 commitment under the Adam Walsh Act. I found in
23 **Wilkinson** essentially that an antisocial personality
24 disorder did not qualify an individual for civil
25 commitment. But the focus in this case has properly

1 been on Mr. Swarm's pedophilia.

2 Significantly both examiners, Dr. Mills and
3 Dr. Saleh, have diagnosed Swarm as suffering from
4 pedophilia, sexually attracted to girls, non-exclusive
5 type. According to what is sometimes called "the Bible"
6 for the diagnosis of mental illnesses, the DSM-IV-TR,
7 the criteria for pedophilia are the following. (A) over
8 a period of at least six months, recurrent intense
9 sexually arousing fantasies, sexual urges or behaviors
10 involving sexual activity with a prepubescent child or
11 children generally age 13 or younger. (B) the person
12 has acted on these sexual urges or the sexual urges or
13 fantasies caused marked distress or interpersonal
14 difficulty. And (C) the person is at least aged 16
15 years and is at least five years older than the child or
16 children in criterion (A).

17 Swarm met and still meets these criteria because,
18 at least until recently, Swarm reported an ongoing
19 sexual interest in prepubescent girls, Swarm masturbated
20 and fantasized about prepubescent girls, Swarm viewed
21 and masturbated to child pornography, and Swarm engaged
22 in sexual behavior involving prepubescent girls
23 including but not limited to [REDACTED]. Swarm's pedophilia
24 is the nonexclusive type meaning that he is attracted to
25 adult women as well as prepubescent women.

1 Dr. Mills and Dr. Saleh correctly agreed with the
2 Bureau of Prisons' memorandum that states, quote:

3 "Paraphilias, including pedophilia, range in severity
4 from a condition in which the individual experiences
5 deviant sexual fantasies and urges, but did not engage
6 in any victim contact, to individuals who act on their
7 urges and fantasies with children or nonconsenting
8 adults, to individuals with significant sadistic or
9 homicidal sexual fantasies, urges, and/or behaviors.

10 These groups can be further divided and subdivided based
11 on the ages and genders of the victims, the relative
12 number of victims, the relationship between the offender
13 and the victims, the presence of multiple paraphilias,
14 more often the rule than the exception, the level of
15 harm to the victims, etcetera." In addition, pedophilia
16 is a chronic condition. It can be managed but it cannot
17 be cured completely.

18 Until 2000, Swarm also smoked marijuana
19 regularly. This injured his ability to control his
20 behavior. In 1997, Swarm was accused by his family of
21 again engaging in sexually inappropriate activity. On
22 his own initiative he returned to the Cortland County
23 Mental Health Clinic and asked to be castrated because
24 he thought castration would cure him of the problem of
25 having fantasies about having sex with young girls.

1 However, Swarm was not castrated nor was he ever given
2 pharmacological treatment, such as antiandrogens, to
3 lower his testosterone. Swarm continued to feel guilty
4 about his fantasies and urges concerning young children
5 and unsuccessfully tried to castrate himself by putting
6 rubber bands around his testicles.

7 In about 1999 or 2000, Swarm molested a ten-year-
8 old girl named [REDACTED] by touching the clothing over her
9 breast and a six-year-old girl named [REDACTED] by touching
10 the clothing over her buttocks. Again, as with [REDACTED],
11 Swarm acted to end the threat he presented to [REDACTED], at
12 least. He gave her a drawing of himself naked which he
13 knew she would give to her parents. Her parents
14 received the drawing, confronted Swarm, and he was
15 allowed to have no further association with [REDACTED], a
16 prohibition he observed. Swarm was not prosecuted for
17 his touchings with [REDACTED] or [REDACTED].

18 In about 1999, Swarm began obtaining child
19 pornography on the Internet. In 2000, he ordered three
20 videotapes of prepubescent children engaged in sexual
21 activity that were being offered for sale by the federal
22 government as part of an undercover operation.

23 In May of 2000, Swarm was arrested and during a
24 search of his home, he showed the officers his hundreds
25 of pictures of child pornography and said -- he told

1 them that he had child pornography stored on his
2 computer. A search of that computer showed about 16,000
3 pornographic files including 300 involving child
4 pornography. And in the search of his home the officers
5 also found 62 marijuana plants growing in Swarm's
6 bedroom.

7 Swarm pled guilty in federal court to the charges
8 of receiving and possessing child pornography and to
9 manufacturing marijuana. These are not offenses
10 involving sexually violent conduct or child molestation
11 as defined -- well, child molestation by Swarm, as
12 defined in the relevant federal regulations. Swarm was
13 sentenced to 74 months in prison. As indicated earlier,
14 the sentencing judge recommended that Swarm be placed in
15 the Bureau of Prisons' sex offender treatment program, a
16 program conducted at FMC Butner in North Carolina. The
17 Bureau of Prisons did not follow this recommendation.
18 Swarm served his sentence at FCI Dix in New Jersey. He
19 participated in some therapy, including sex offender
20 therapy, but sporadically. He also took some
21 antidepressants that were prescribed for him in Dix.

22 While in prison Swarm did not use illegal drugs or
23 alcohol, which are often available in prison and, I
24 find, were likely available to him. He also did not act
25 out in any sexual way while serving his prison

1 sentence. He exhibited no hypersexuality. In addition,
2 he had no disciplinary violations while serving his
3 sentence.

4 As explained earlier, Swarm was released in 2005.
5 At that time he agreed to more stringent conditions of
6 supervised release than were originally imposed,
7 including polygraph exams to assure compliance with
8 those -- with the other conditions. He participated in
9 group sex offender therapy at the Family and Children's
10 Services. There he was perceived by his therapist,
11 Walsh, to be doing well. For example, he discussed with
12 the group whether it would be appropriate for him to go
13 to the local Maple Festival to man a booth for his
14 church and then decided not to go when he focused, in
15 that group therapy, on the fact that children would be
16 there. Swarm also received from his probation officer,
17 Michael Pierce, approval to be with particular children
18 in the presence of their parents. In that way he
19 conformed to the requirements of his conditions of
20 supervised release.

21 In his group therapy and with his probation
22 officer Swarm was demonstrating an increasing knowledge
23 of the techniques to control his pedophilic fantasies
24 and urges. However, as also indicated earlier, Swarm
25 also disclosed that he had, on a few occasions, been in

1 the presence of minors without an approved supervisor.
2 One young girl hugged him around the legs. When this
3 occurred, Swarm left quickly and waited in his car for
4 his friend, the friend with whom he had come to that
5 home, to come out. On another occasion, [REDACTED]
6 sat on his lap in the presence of her father. Swarm
7 told her that she shouldn't do that. Swarm did not
8 molest either of those two children, however he only
9 disclosed some of these incidents shortly before a
10 polygraph exam he feared he would fail if he didn't
11 disclose them.

12 Although Swarm did not violate the conditions of
13 his supervised release by using drugs or abusing
14 alcohol, Swarm's supervised release was revoked in
15 November of 2006 for this unapproved contact with minor
16 children and the failure to include those associations,
17 incidents in his monthly reports in a timely way. As
18 previously described, Swarm was sentenced to four months
19 in prison and he was certified as sexually dangerous in
20 2007 one day before that four-month sentence was to
21 conclude. He is still in custody now, four years after
22 his scheduled release.

23 As described earlier, as required by the Adam
24 Walsh Act, I appointed two examiners. They examined
25 Mr. Swarm in 2008. Dr. Mills examined him again in late

1 2010. Dr. Saleh examined Mr. Swarm again in January of
2 2011. Dr. Mills opined in 2008 and 2010 that Swarm was
3 not a sexually dangerous person. Dr. Saleh opined in
4 2008 and 2011 in his written reports that Swarm was a
5 sexually dangerous person. However, as Dr. Saleh
6 testified, when he expressed the opinion that Swarm was
7 sexually dangerous, he had not focused on the conditions
8 of supervised release and, in giving his opinions, he
9 had assumed that Swarm would not receive treatment for
10 his pedophilia and would have access -- unrestricted
11 access to children when released. When Dr. Saleh
12 considered that Swarm would be provided treatment and
13 that his access to young girls would be restricted, he
14 opined that Swarm would not have serious difficulty in
15 refraining from molesting children while on supervised
16 release for four and a half years or thereafter. I
17 agree. And the government has not proven by clear and
18 convincing evidence that he will have serious difficulty
19 in refraining from child molestation.

20 My specific findings with regard to the elements
21 of Section 4248 are as follows. Swarm has a conviction
22 that makes him eligible for civil commitment under the
23 Adam Walsh Act. It is his 1994 conviction for attempted
24 sexual abuse of [REDACTED] The 2000 federal conviction for
25 possession of child pornography did not involve child

1 molestation by Swarm within the meaning of 28 CFR
2 Section 549.93.

3 Swarm has a mental illness, pedophilia. I am not
4 persuaded that Swarm no longer has intense sexual
5 fantasies or urges regarding prepubescent children,
6 although he told Dr. Saleh recently that he no longer
7 had those fantasies and urges and he testified that he
8 no longer has those fantasies and urges. I do believe
9 that Mr. Swarm has been trying to diminish his fantasies
10 and urges using techniques he learned at the Family and
11 Children's Society while on supervised release.
12 However, I agree with Dr. Saleh that like drug
13 addiction, pedophilia is a chronic condition. It can be
14 successfully managed, but not completely cured.

15 It is a close question whether Swarm's pedophilia
16 has been proven by clear and convincing evidence to
17 today be serious. As explained earlier, pedophilia
18 ranges in severity. Some pedophiles never act on their
19 urges, others are sadistic or homicidal. Historically
20 Swarm has been in the middle, both acting by touching
21 prepubescent girls, but also restraining himself from
22 doing more harm by giving the letter to [REDACTED] and the
23 picture to [REDACTED], for example.

24 Swarm has not improperly touched a child since at
25 least 2000. I recognize that most of the time since

1 2000 Swarm has been locked up, however, if he was on
2 supervised release for 13 months in 2005 and 2006, he
3 did not molest any child in that period. When he found
4 himself with prepubescent girls twice, without an
5 approved supervisor, he, in one instance, left and sat
6 in his car, as I explained, and in another instance he
7 asked the girl to get off his lap.

8 The circumstances established by the facts in this
9 case do not suggest pedophilia that's nearly as extreme
10 as that the Supreme Court dealt with in **Hendricks**. I
11 understand that something that extreme is not required,
12 but I think **Hendricks** does reflect one circumstance in
13 which a civil commitment is appropriate. Every case has
14 to be decided individually, however, and that's what I'm
15 doing. I know that the situation does not have to be as
16 extreme as in **Hendricks** to justify civil commitment.

17 Despite all of the foregoing facts, Dr. Saleh --
18 or in view of all of the foregoing facts, Dr. Saleh
19 regards Swarm's pedophilia to be sufficiently serious to
20 justify pharmacological treatment with antiandrogens
21 that lower testosterone, although not to require such
22 treatment. Therefore, for the purposes of analysis I
23 have assumed that Swarm's pedophilia is now serious and
24 have focused on the ultimate question.

25 As I've said, the government has not proven by

1 clear and convincing evidence that as a result of this
2 serious pedophilia, or any serious pedophilia, Swarm
3 will have serious difficulty refraining from sexually-
4 violent conduct or child molestation if released on the
5 existing conditions of supervised release for four and a
6 half years or thereafter. The government agrees there's
7 no evidence Swarm will be sexually violent. The issue
8 is whether he will have serious difficulty refraining
9 from child molestation if released on the current
10 conditions. The key conditions of Swarm's supervised
11 release are feasible conditions.

12 He will be supervised by a federal probation
13 officer trained to deal with sex offenders, Michael
14 Pierce. He will be on home detention for whatever
15 period is prescribed by Pierce and that would be a
16 feasible condition of supervised release.

17 The Dixie 2000 boarding house in Binghamton is a
18 facility for level 3 sex offenders like Swarm.
19 Arrangements can be made for him to live there. While
20 he lives there he could be on electronic monitoring and
21 also be attached to a GPS device. The electronic
22 monitoring and the GPS device will tell probation where
23 Swarm is. Knowing that he can be tracked will deter
24 Swarm from having unsupervised association with young
25 girls. This will keep him away from situations that

1 could trigger action -- or trigger urges and action on
2 urges to molest.

3 The home detention, I expect, will be most
4 valuable in the early part of Swarm's supervised release
5 before he has participated much in sex offender
6 treatment. As a condition of his supervised release,
7 Swarm will be regularly tested for the use of drugs,
8 including marijuana and alcohol, and will be given drug
9 treatment or be required to participate in a drug
10 treatment program. Such testing and treatment are
11 readily available to individuals on supervised release.

12 Drug addiction is not itself a basis for a civil
13 commitment, but if Swarm uses drugs or alcohol, the risk
14 that he will act on any urge to molest a child will be
15 magnified. However, although addicted to marijuana and
16 arrested in 2000, Swarm has not used it since, including
17 in 2005 and 2006 when he was being regularly drug tested
18 while on supervised release. This abstaining from
19 marijuana shows an ability by Mr. Swarm to conform his
20 conduct to legal requirements despite a chronic
21 condition or addiction. If tests show that Mr. Swarm is
22 using drugs or alcohol, he will have his supervised
23 release revoked. Mr. Pierce made that plain.

24 Sex offender treatment will also be available to
25 Swarm. He would like to return to the Family and

1 Children's Society in Binghamton and continue to work
2 with Ms. Walsh and her group. He was making progress
3 when his supervised release was revoked. However,
4 Ms. Walsh's testimony indicates that Family and
5 Children's Services may not take him back. However, if
6 necessary, Swarm can travel about an hour to Syracuse or
7 Ithaca, New York and participate in another sex offender
8 treatment program which has a contract with the
9 probation office for the Northern District of New York.
10 There are such programs both in the Ithaca area and in
11 the Syracuse area.

12 Mr. Swarm is, pursuant to his conditions of
13 supervised release, required to participate in sex
14 offender treatment. Although not spelled out, the
15 probation officer could require, as part of that
16 treatment, pharmacological treatment in the form of
17 antiandrogen therapy, which Mr. Swarm wants.
18 Antiandrogens reduce testosterone levels and therefore
19 both the urge to molest and the ability to do so in some
20 forms.

21 The probation office in the Northern District of
22 New York has no experience or protocol concerning
23 antiandrogen therapy. If Swarm is medically eligible
24 for antiandrogen therapy, which is an open question
25 because he has diabetes, antiandrogens could be

1 prescribed by a psychiatrist specializing in sex
2 offender treatment anywhere, in Boston, in New York
3 City. Anywhere. Shots could be given by a urologist or
4 a general practitioner in the Syracuse area. Such shots
5 are sometimes given once a month, in some cases they're
6 given once every three months, and in other cases
7 they're given once a year, as Dr. Saleh explained.

8 Antiandrogen therapy can have a life-long effect
9 in depressing testosterone levels even after the shots
10 have ceased. Antiandrogen therapy would decrease any
11 difficulty Swarm might have in refraining from molesting
12 young girls. However, Dr. Saleh persuasively testified
13 that Swarm would not have serious difficulty in
14 refraining from molesting even if he did not receive
15 antiandrogen therapy. I agree.

16 Swarm has demonstrated some ability to restrain
17 himself from acting on urges to molest before 2000. The
18 letter he gave [REDACTED] and the picture he gave [REDACTED] are
19 manifestations of this capacity. As Dr. Mills
20 testified, Swarm has no frontal lobe abnormality that
21 impairs his ability to act on his understanding of right
22 and wrong. As I said earlier, Swarm stopped using
23 marijuana, which was a manifestation of his capacity to
24 control his behavior despite his addiction. Swarm's
25 supervised release was revoked because he made certain

1 disclosures before he took a polygraph that he feared he
2 would fail. This, too, is evidence of an ability to
3 anticipate consequences and be deterred, and in this
4 case or in the case of the polygraph, from lying.

5 I also find that Mr. Swarm is now highly motivated
6 to participate in sex offender treatment. That
7 motivation comes in part from a desire to end what he
8 characterized as a "nightmare" of the suffering he has
9 at times felt due to his pedophilia. Swarm has at times
10 showed a desire to end the threat he presents to others
11 or his pedophilia presents to others. He did that by
12 seeking medical castration and by attempting to castrate
13 himself. His desire for antiandrogens is another
14 manifestation of his desire to end any potential threat
15 that his pedophilia might present.

16 Swarm is now also highly motivated to be
17 successfully treated for another reason. He understands
18 the severe consequences if he fails to refrain from
19 acting on any urge to molest. If he fails to abide by
20 the conditions of his supervised release, for example,
21 if he's again in the vicinity of minors without an
22 approved supervisor, Mr. Pierce made it clear he will be
23 revoked, the supervised release will be revoked, Swarm
24 will be in prison, and then he will be facing again the
25 possibility of civil commitment for up to the rest of

1 his life. If Mr. Swarm molests a child, Mr. Pierce made
2 it clear that he will be prosecuted and he will be
3 sentenced, he will serve a prison sentence, and again
4 he'll be subject to civil commitment indefinitely.

5 In reaching my conclusions I recognize that Swarm
6 has received some sex offender treatment before and has
7 not been fully successful. However, he was making
8 progress, according to Walsh and his probation officer,
9 in learning some techniques when he was on supervised
10 release and in the program at Family and Children's
11 Services. If they take him back, he will be highly
12 motivated.

13 If he does not return to Family and Children's
14 Services, he will participate in a program, a sex
15 offender treatment program in Syracuse or Ithica.
16 Reports and testimony generated in this case will
17 provide valuable information to his therapist which has
18 not been available before. I discern that Mr. Swarm has
19 also gained insights as well in the course of this
20 case. And being incarcerated for the last four years
21 has also intensified his understanding of why it's
22 important that he not molest anybody in the future.

23 If Swarm successfully participates in sex offender
24 treatment for the four and a half years while on --
25 while he will be on supervised release, he will have

1 learned techniques that will serve him well for the rest
2 of his life. If Swarm does not fully and properly
3 participate in treatment, his supervised release will be
4 revoked and he will be locked up. The requirements of
5 home detention and no unsupervised contact with minors
6 will likely keep Swarm away from triggers that could
7 prompt urges to molest or present opportunities to
8 molest. In addition, as Drs. Mills and Saleh explain,
9 as Swarm gets older, any dangerousness he may present
10 should diminish.

11 In essence I agree with Dr. Saleh and find that
12 the government has not proven that Swarm is likely to
13 have serious difficulty in refraining from molesting.
14 The government has not shown that he is likely to commit
15 a hands-on offense in the future. I recognize the risk
16 that he may violate again another condition of the
17 supervised release. If that happens, I'm persuaded that
18 he will be promptly revoked and locked up.

19 In reaching my conclusions I've considered the
20 evidence that favors the government. Some of it
21 includes the following. On the actuarial instrument,
22 the Static 99R, Swarm scored in the moderate high risk
23 category for recidivating. This, since the **Daubert**
24 challenge to these instruments was withdrawn, this is a
25 piece of data to be considered and like Dr. Mills and

1 Dr. Saleh I have considered it. However, as Dr. Saleh
2 persuasively testified, such a test which predicts
3 future conduct by a large group of people with certain
4 common characteristics may be, as the doctor said, "more
5 misleading than helpful" in assessing the risk for any
6 particular person. Everyone is unique including
7 Mr. Swarm.

8 I also have indicated and continue to recognize
9 that Mr. Swarm has not successfully completed sex
10 offender treatment in the past. However, sex offender
11 treatment was not provided to him -- he wasn't provided
12 an opportunity to participate in the Bureau of Prisons'
13 sex offender treatment program at Butner as the
14 sentencing judge recommended in 2002. I'm sorry, in
15 2000. The program that he was offered in Dix was not
16 tailored to his needs. Mr. Swarm now has strong reasons
17 to fully participate and increase knowledge as well.

18 I also recognize and have considered the fact that
19 Mr. Swarm is still infatuated with [REDACTED]. However, his
20 illegal involvement with [REDACTED], when she was 13 to 15,
21 was past puberty and was sexually experienced, was not a
22 manifestation of his pedophilia. It was illegal, but it
23 was -- because she was not a prepubescent child, it was,
24 in fact, as Dr. Saleh pointed out, not necessarily a
25 manifestation of pedophilia. I find that it was not.

1 Moreover [REDACTED] is now an adult. Similarly I've
2 considered that Mr. Swarm continues to have an interest
3 in [REDACTED], but that is tempered by his knowledge that
4 marriage to her is impossible and she is also an adult.

5 On July -- I'm sorry, not July. On January 19th,
6 I heard testimony from Dr. Andres Hernandez, the doctor
7 at FMC Butner who runs the program that would treat
8 Swarm if he were civilly committed. That program could
9 include antiandrogens. It would take at least 25 months
10 to complete. I believe Swarm would benefit from such a
11 program. There would be even less risk if he completed
12 such a program and were released.

13 However, I may wish he had been provided such
14 treatment during the six years that he was in the Bureau
15 of Prisons' custody as a result of the sentence imposed
16 in the Northern District of New York in 2000, but that's
17 not the relevant legal question. The question for me is
18 not "Would Mr. Swarm benefit from the program now being
19 run at Butner that has two people in it?" I've
20 described the legally relevant questions previously. As
21 I've explained, the government has not proven by clear
22 and convincing evidence that Swarm's pedophilia would
23 cause him to have serious difficulty refraining from
24 molesting children if he's now released on the existing
25 conditions. Therefore, the government's request that he

1 be civilly committed pursuant to Section 4248 is denied,
2 as I've said earlier, and I'll memorialize this in a
3 written order.

4 Swarm shall be released to begin serving his term
5 of supervised release on March 7th, 2011. The parties
6 shall order the transcript of the decision I've rendered
7 orally today. The Court Reporter shall produce it as
8 quickly as possible. I'll review it to make any
9 necessary corrections, if there's been a
10 miscommunication, but the transcript will be at least
11 the initial record of the decision. It's possible I'll
12 convert the transcript into a more formal memorandum and
13 order.

14 I'm ordering that the parties confer and that the
15 government, by February 14th, 2011, file a motion for a
16 stay of this order or state that it does not intend to
17 file such a motion. The standards for a stay pending
18 appeal are familiar and are mentioned at the end of my
19 **Wilkinson** decision. They derive from the Supreme
20 Court's decision in **Hilton**, among other cases. If the
21 government moves for a stay, Swarm shall respond to that
22 motion by February 29th.

23 As I said earlier, this is a matter that
24 everybody's recognized has important consequences both
25 for Mr. Swarm and for the public. The parties have been

1 very well represented. And now I've rendered my
2 decision.

3 Is there anything further in this matter for
4 today?

5 MS. CONNOLLY: No, your Honor.

6 MR. GOLD: No, your Honor.

7 THE COURT: All right. The Court is in
8 recess.

9 (Ends, 2:45 p.m.)

10
11 C E R T I F I C A T E
12

13 I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,
14 do hereby certify that the foregoing record is a true
15 and accurate transcription of my stenographic notes,
16 before Chief Judge Mark L. Wolf, on Friday, January 21,
17 2011, to the best of my skill and ability.

18
19
20 /s/ Richard H. Romanow 01-25-11

21 _____
RICHARD H. ROMANOW Date
22
23
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25